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U.S. Citizenship
and Immigration
Services

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BL

MAR 11 2004

FILE: EAC-01-108-50889 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:

PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3)
of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

Eligibility in this matter hinges on whether the petitioner has established that the beneficiary met the petitioner's qualifications for the position as stated in the Form ETA 750 as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor.

The petition's priority date in this instance is October 31, 2000. The offered salary as stated on the ETA 750 is \$12.57 per hour for 35 hours per week or \$22,877.40 per year. The Form ETA 750 indicated that the position of cook required two years of experience in the job offered.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 204.5(d). *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage and of the beneficiary's qualifications for the position. In a request for evidence (RFE) dated June 10, 2002, the director required additional evidence on each of those issues.

Counsel responded to the RFE with a letter dated September 4, 2002 accompanied by additional evidence.

The director determined that the evidence did not establish that the beneficiary had the job experience required for the offered position as of the priority date, and denied the petition.

On appeal, counsel submits no brief and no evidence.

In the RFE the director stated that CIS questioned the credibility of a declaration from the Fogao De Lenha Restaurant, of Panagui, Brazil, which was the only documentary evidence submitted by the petitioner to corroborate his claim of prior work experience as a cook. The director stated that the reason for questioning the credibility of that document was adverse information about the beneficiary's credibility contained in a memorandum from the Operations Unit at the Vermont Service Center. The RFE quoted the following portion of that memorandum:

The former employer stated that [the beneficiary] was employed at his establishment as a cook from 10011986 through 03311990. However, since it appears [the beneficiary's] most recent entry into the United States was through misrepresentation and that the supporting evidence [the beneficiary] submitted with his I-539 application was false, the validity of this declaration is questionable. In addition, [the beneficiary] indicated that he was a "businessman" with previous [CIS] applications. He specifically stated on his G-325 that he was an assistant bank manager from May 1996 through May 1998, and unemployed prior to those dates.

Request for Evidence, June 10, 2002, quoting Memorandum from Vermont Service Center Operations Unit dated February 14, 2002.

Counsel's response to the RFE included an additional statement of experience from the owner of the Fogao de Lenha Restaurant's owner, plus copies of two pay statements from 1990 showing Antonio Guerino, the owner of the Fogao de Lenha Restaurant as the person issuing the pay statement and the beneficiary as the employee. Counsel's response to the RFE also included evidence of the petitioner's ability to pay the proffered wage.

In his decision denying the petition the director acknowledged the receipt of additional evidence concerning the beneficiary's claimed prior employment. The director noted that the additional statement of experience includes the telephone number of the restaurant's owner and that the pay statements show payments to the beneficiary in January and February of 1990. But the director found that those two pay statements do not corroborate the entire period of beneficiary's employment from October 1, 1986 to March 31, 1990.

Counsel asserts on appeal that the documentation submitted in response to the RFE sufficiently corroborates the petitioner's other evidence concerning the work experience of the beneficiary.

The two pay statements from 1990 do offer some corroboration for the beneficiary's claim of prior employment with the Fogao de Lenha Restaurant. Nonetheless, counsel's response to the RFE ignores the credibility concerns raised in the Memorandum from the Vermont Service Center Operations Unit and quoted in the RFE. The memorandum's statements that the beneficiary had apparently entered the United States through misrepresentation, had made false statements on a Form I-539 (Application to Extend/Change Nonimmigrant Status) and had provided inconsistent information on his Form G-325 about his prior employment raised serious concerns about the credibility of the beneficiary. If the statements from the quoted memorandum were incorrect counsel could have submitted evidence on those issues with the petitioner's response to the RFE.

With regard to the two pay statements for 1990, counsel's evidence contains no explanation of the source of those documents, nor any explanation for the absence of pay statements for the other pay periods from October 1986 to March 1990, the claimed period of the beneficiary's prior employment as a cook. In light of adverse information about the credibility of the beneficiary in the quoted memorandum, it was appropriate for the director to find that the evidence submitted in response to the RFE was insufficient to corroborate the beneficiary's claimed prior employment from October 1986 to March 1990.

In summary, the issue in the instant case is whether the beneficiary met all of the requirements stated by the petitioner in block #14 of the labor certification as of the day it was filed with the Department of Labor. The petitioner has not established that the beneficiary had two years of experience as a cook on October 31, 2000. Therefore, the petitioner has not overcome this portion of the director's decision.

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The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.